

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

SHEIKH BAHARULLA, *alias* BAROMIA (PLAINTIFF) *v.* SHEIKH  
MAGAN (DEFENDANT).\*

1869  
May 14.

*Kabuliat—Intervenor—Act X. of 1859, s. 77—Onus of Proof.*

In a suit to obtain a kabuliat, the defendant admitted the plaintiff's title. A third party intervened under section 77, Act X of 1859 alleging that he was in the actual receipt and enjoyment of the rent.

*Held*, that the onus was upon the intervenor to prove that he was *bona fide* in actual receipt and enjoyment of the rent, and not on the plaintiff to prove his possession.

Baboo Chandra Madhab Ghose and Kali Mohan Das for the appellant.

Baboo Ramesh Chandra Mitter and Nalit Chandra Sen for the respondent.

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by

BAYLEY, J.—We think that the judgment of the lower Appellate Court must be reversed, and the case remanded for re-trial.

The plaintiff sued the defendant (ryot) for a kabuliat. The defendant admitted the plaintiff's right to the kabuliat sued for. An intervenor appeared on the allegation that he was in actual receipt and enjoyment of the rents *bona fide*.

The first Court, taking all the evidence into consideration, considered that the intervenor had proved actual receipt and enjoyment of the rent *bona fide* as required by section 77, Act X. of 1859, and dismissed the plaintiff's suit.

The plaintiff appealed before the lower Appellate Court, and the substance of his petition of appeal was, that the first Court was wrong in point of law in dismissing his suit when the intervenor had failed to prove actual receipt and enjoyment of rent by him, and when he (plaintiff) had given sufficient proof of his having been in actual receipt and enjoyment of the rents.

By this pleading in appeal, the lower Appellate Court had distinctly brought before it the question of the adjudication of the claim of the intervenor; but instead of requiring the intervenor to prove his special plea as required by the law *viz.*, "the question of the actual receipt and enjoyment of rent by such "third person shall be enquired into," &c., the enquiry of the lower Appellate Court seems to have been confined to the right of the plaintiff to possession. The lower Appellate Court thus seems to have cast the *onus of proof* on the plaintiff; and finding from the award under section 318, Civil Procedure Code, and other circumstances that the plaintiff was not in possession, the lower Appellate Court dismissed the plaintiff's suit. The lower Appellate Court further seems to have paid no regard to the fact that the party, against whom

\* Special Appeal, No. 3257 of 1868, from a decree of the Judge of Dacca, dated the 9th September 1868, affirming a decree of the Officiating Deputy Collector of that district, dated the 30th March 1868.

1869

SHEIKH  
BAHARULLA  
*alias*  
BAROMIA  
v.  
SHEIKH  
M<sup>r</sup> AGAN

the suit for the kabuliat was brought, actually admitted the plaintiff's right, and that but for the intervenor's coming in the plaintiff's case would have been thereby proved. The case was distinctly one in which under the law cited (section 77, Act X, of 1859), it was for the intervenor to prove the fact of the actual receipt and enjoyment of the rents *bona fide* by him, and as the lower Appellate Court seems to have misplaced the *onus* on the plaintiff, we remand the case to that Court to re-try the case, putting in issue whether the intervenor was in actual receipt and enjoyment of the rents *bona fide* before and up to the institution of the suit.

Costs will follow the result.

-----  
*Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

1869  
May 15

GUPINATH ROY AND ANOTHER (DECREE-HOLDERS) v. DINABANDHU  
NANDI AND OTHERS (JUDGMENT-DEBTORS).\*

*Satisfaction of Cross Decrees—Application to issue Execution.*

By mutual agreement two decree-holders entered up satisfaction in respect of their cross-decrees. Nevertheless one of them appealed from the decree passed against him and obtained its reversal. He then applied to issue execution on his cross-decree.

*Held*, that the application could not be entertained as satisfaction had been entered.

The grounds upon which the application could have been entertained discussed.

Baboo *Kishendayal Roy* for appellant.

Baboo *Mahendra Lal Seal* for respondent.

JACKSON, J.—IN this case, the special appellants before us, Gupinath Roy and another, gained a decree against Dinabandhu, that is to say, he was entitled to recover the costs of the suit in which he was defendant. Dinabandhu had another decree under which he was entitled to recover 138 rupees against Gupinath. On these decrees coming for execution before the Moonisiff in whose Court they were, the parties by mutual agreement caused satisfaction to be entered of both decrees. Notwithstanding this, Gupinath proceeded with an appeal against the decree on which he was liable, and obtained a reversal of that decree. Having done so, he applied to the Moonisiff for execution of his own decree, inasmuch as that which had been set off against it having been set aside, he considered that he was entitled to execute his decree, without reference to what had passed. The Moonisiff took this view of it, and ordered execution to proceed. The Judge, when the case came before him on appeal, found that the Moonisiff had on a first application declined to allow this execution, but that subsequently he reviewed his order, and admitted execution. The Judge considered that the lower Court was not competent to review

\*Miscellaneous Special Appeal, No. 115 of 1869, from an order of the Judge of East Burdwan, dated the 16th December 1868, reversing an order of the Officiating first Moonisiff of that district, dated the 23rd July 1868.